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No. 03-1384

Supreme Court
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In The

# Supreme Court of the United States

CHERYL JANE FOLLOWELL,
as Personal Representative of the
Estate of Betty Jean Gurley,

*Petitioner,*

v.

GEORGE E. MILLS, JR.,
Chapter 7 Trustee,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly ruled that the doctrines of res judicata and collateral estoppel barred Petitioner from relitigating issues of ownership and value of property already finally determined by both the Florida and the Tennessee bankruptcy courts.

2. Whether the Eleventh Circuit correctly affirmed the Florida bankruptcy court's ruling that 11 U.S.C. § 502(h) did not give rise to a claim against Debtor's estate because Mrs. Gurley did not hold any pre-petition claim against her husband, Debtor herein.

## PARTIES TO THE PROCEEDING

There are no parties other than the ones named in the caption.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, George E. Mills, Jr., Chapter 7 Trustee of the Estate of William M. Gurley, requests that the Court deny the petition for writ of certiorari seeking review of the opinion entered by the United States Court of Appeal for the Eleventh Circuit in *In re William M. Gurley, Debtor*, Case Number 03-11602, on December 31, 2003.

## INTRODUCTION

Petitioner, the personal representative of the probate estate of Betty Jean Gurley, seeks a third review of the decision of the United States Bankruptcy Court for the Middle District of Florida granting the Trustee's Motion for Summary Judgment on his objection to the claim Mrs. Gurley asserted to assets belonging to the bankruptcy estate of her husband, William M. Gurley (*"Gurley III"*).[1] In the statement of the case and of the facts, Petitioner omits or obscures express findings of fact and specific rulings of law made by two bankruptcy courts that considered and resolved the very issues Mrs. Gurley attempted to relitigate through the disallowed claim. Bankruptcy courts in both Florida and Tennessee expended considerable time and effort to untangle the web of confusion and deceit spun by William Gurley in his continuing attempts to protect his assets from his creditors.

[1] *In re William M. Gurley, Debtor*, Case No. 95-03833 (Order of Dec. 27, 2001) (Bankr. M.D. Fla. 2001), *aff'd*, Case No. 6:02-cv-00192 (M.D. Fla. Feb. 28, 2003), *aff'd*, Case No. 03-11602 (11th Cir. Dec. 31, 2003).

In *In re William M. Gurley*, the Florida Bankruptcy Court determined that Mr. Gurley had never divested himself of the assets he purported to transfer to Mrs. Gurley; she held those assets as Mr. Gurley's nominee. The Florida Bankruptcy Court's Amended Final Judgment authorized George E. Mills, Jr., Mr. Gurley's Chapter 7 Trustee (the "Trustee"), to recover those assets for Mr. Gurley's estate. Nonetheless, the Tennessee Bankruptcy Court, in Mrs. Gurley's subsequent Chapter 11 proceeding, ruled that the disputed assets were property of Mrs. Gurley's estate. The Tennessee Bankruptcy Court construed the Florida Bankruptcy Court's judgment as creating an equitable interest in the disputed assets to the extent that Mr. Gurley had retained an interest in those assets. Mr. Gurley's Chapter 7 Trustee, Respondent herein, asserted that interest as a claim against Mrs. Gurley's bankruptcy estate. In evaluating that claim, the Tennessee Bankruptcy Court valued Mr. Gurley's retained interest (the Trustee's equitable interest) in those assets. Mrs. Gurley paid the value of that interest to Mr. Gurley's Chapter 7 estate as part of her confirmed consensual plan of reorganization. Mrs. Gurley's claims in Mr. Gurley's bankruptcy were a collateral attack on the rulings of the Tennessee Bankruptcy Court and the Florida Bankruptcy Court and another attempt to reclaim property finally determined to properly belong in Mr. Gurley's estate.

The United States District Court for the Middle District of Florida, sitting in its appellate capacity, carefully reviewed the record before the Bankruptcy Court in the context of the rulings in the two earlier bankruptcy proceedings and upheld what it described as the Florida Bankruptcy Court's well reasoned decision to grant summary judgment. The Eleventh Circuit affirmed

the decision of the United States District Court. The issues raised in this petition are not novel nor are they of importance to anyone other than the parties to this proceeding. The opinion of the Eleventh Circuit does not conflict with the decisions of this Court or of any other United States Circuit Court of Appeal. There is no reason to grant certiorari review of this action; there is compelling reason to deny review and to allow the bankruptcy court to complete its administration of Mr. Gurley's bankruptcy estate.

## STATEMENT OF THE CASE

Petitioner's summary of the decision and judgment of the United States Bankruptcy Court for the Middle District of Florida (the "Florida Bankruptcy Court") in the adversary action the Trustee brought against Mrs. Gurley[2] (*Gurley I*) misstates important facts the court expressly found and distorts the holding itself. The Florida Bankruptcy Court found that Mr. Gurley, the Debtor, had placed certain assets in his wife's name in an attempt to remove them from his bankruptcy estate. The Florida Bankruptcy Court ruled that because Mr. Gurley had not relinquished control and dominion over the assets, and because his wife exercised no dominion and control over them, Mrs. Gurley was a nominee and Mr. Gurley's equitable interest in those

[2] *Mills v. Betty Jean Gurley (In re William M. Gurley)*, Bankruptcy No. 95-03833, Adversary No. 95-293A (Bankr. M.D. Fla. Sept. 16, 1997), *aff'd*, Case No. 6:98-cv-D-1169 (M.D. Fla. Aug. 9, 1999), *aff'd*, Case No. 99-13416 (11th Cir. Sept. 20, 2000), *cert. denied*, 532 U.S. 1009, 121 S. Ct. 1736, 149 L. Ed. 2d 660 (2001).

ostensibly transferred assets remained a part of his estate. App. 27a-28a. This analysis applied specifically to certain accounts, payment streams and specific property identified in the Memorandum Opinion that appears as Petitioner's Appendix C. The Florida Bankruptcy Court applied a different analysis to the business known as Moltan. Moltan was a sole proprietorship of the Debtor, William M. Gurley. The Florida Bankruptcy Court found that no transfer of that business had ever been made to Mrs. Gurley. App. 19a-20a.

Petitioner states that the Florida Bankruptcy Court "included all property held by Mrs. Gurley – including the $7 to $8 million in her own assets and her own survivorship interest in the real property – in her husband's bankruptcy estate." Petition at 3. The Amended Judgment the Florida Bankruptcy Court entered in Adversary Action No. 95-293A demonstrates that Petitioner's statement is not accurate. In fact, the Florida Bankruptcy Court specifically listed those items which were recoverable property – each of which had been the property of William Gurley prior to the purported or attempted transfer. [R. 5 at 28]

Even if Petitioner were accurate in representing that Mrs. Gurley's separate property and her survivorship interest in the Debtor's property was included in the Debtor's estate, that representation would serve only to show that the issue she seeks to assert in this litigation was properly before the Florida Bankruptcy Court and subject to direct appeal. In fact, Mrs. Gurley appealed the Florida Bankruptcy Court's ruling to the United States District Court for the Middle District of Florida, which upheld the Florida Bankruptcy Court's ruling on all

points. *Gurley v. Mills (In re William M. Gurley)*, Case No. 98-cv-D-1169 (M.D. Fla. 1999).

Mrs. Gurley next appealed to the Eleventh Circuit, which also affirmed the ruling of the Florida Bankruptcy Court. *Gurley v. Mills (In re William M. Gurley)*, Case No. 99-13416 (11th Cir. Sept. 20, 2000). This Court declined to grant certiorari. *Gurley v. Mills*, 532 U.S. 1009, 121 S. Ct. 1736, 149 L. Ed. 2d 660 (2001).

*Gurley I* was Mrs. Gurley's first litigation of her interest in assets that are part of the Debtor's estate.

While her appeal to the United States District Court for the Middle District of Florida was pending, Mrs. Gurley herself sought bankruptcy protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Tennessee (the "Tennessee Bankruptcy Court"). She immediately filed an adversary action against George E. Mills, Jr., as Trustee, to recover the same assets the Florida Bankruptcy Court had directed the Trustee to marshal into Mr. Gurley's estate. *See Gurley v. Mills (In re Betty Jean Gurley)*, 222 B.R. 124 (Bankr. W.D. Tenn. 1998) ("*Gurley II*"). In this action, Mrs. Gurley expressly and unequivocally asserted her claim to **every** asset in Mr. Gurley's estate in which she claimed an interest. The Tennessee Bankruptcy Court agreed with Mrs. Gurley that the assets themselves were part of her estate in *Gurley I*. 222 B.R. at 138. Thus, **every asset listed in the Florida Bankruptcy Court's Order of September 16, 1997, was included in Mrs. Gurley's bankruptcy estate**.

The Tennessee Bankruptcy Court interpreted the Florida Bankruptcy Court's decision as establishing that

Mr. Gurley had an equitable interest in certain assets of Mrs. Gurley's estate.[3] As a result, the Tennessee Bankruptcy Court valued Mr. Gurley's interest in those assets. Petitioner is correct that only Mr. Gurley's interest was valued. All of Mrs. Gurley's interests, regardless of whether a value was assigned, remained in her estate. App. 34a-35a.

Mrs. Gurley did not appeal the Tennessee Bankruptcy Court's valuation of Mr. Gurley's equitable interest. Rather, she prepared a plan of reorganization that accepted the court's valuation of Mr. Gurley's interest and voluntarily satisfied that interest with a cash payment. Any residual interest in the assets, including Mrs. Gurley's survivorship interest, remained part of her estate. That plan was confirmed; the valuation of Mr. Gurley's interest and, by extension, Mrs. Gurley's retention of all remaining interest, became final for all purposes.

*Gurley II* was Mrs. Gurley's second litigation of the value of her interest in the assets which the Florida Bankruptcy Court ruled were part of Mr. Gurley's estate.

Petitioner, as personal representative, now seeks review of *Gurley III* – Mrs. Gurley's third attempt to reclaim that which has been finally and irrevocably determined to belong to her widower's estate.

Mrs. Gurley asserted several claims in her husband's estate. Claim number 3, a claim on a note, was disallowed,

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[3] Respondent specifically challenges Petitioner's representation that Mrs. Gurley was deprived of all of her property by the actions of the Florida and the Tennessee Bankruptcy Courts.

and Mrs. Gurley did not appeal that determination. Claim number 4 and claim number 8 were, respectively, claims to recover the secured and the unsecured portion of Mr. Gurley's claims in Mrs. Gurley's estate – claims Mrs. Gurley had voluntarily satisfied in full as part of her plan of reorganization. Claim number 4 and claim number 8 were consolidated in claim number 9. App. 35a-37a.

In her plan of reorganization, Mrs. Gurley reserved the right to assert a claim in Mr. Gurley's estate. At the time her plan was proposed and confirmed, Mrs. Gurley was in the midst of appeals of the Florida Bankruptcy Court's ruling. Had the appellate courts reversed all or part of the Florida Bankruptcy Court's decision, Mrs. Gurley would clearly have had a meritorious claim in the Debtor's estate. However, Mrs. Gurleys' appeals were unsuccessful at every level. The Florida Bankruptcy Court's decision was upheld in the face of Mrs. Gurley's tenacious attacks. The present claim does not represent the petitioner's efforts to obtain the return of assets (or value) that was rightfully Mrs. Gurley's at the time it was paid into Mr. Gurley's estate. Rather, it constitutes a collateral attack on the final and effective decisions of *Gurley I* and *Gurley II*.

The facts set forth by Respondent are consistent with and derived from the decisions of the courts in the earlier, separate litigation. Based on these undisputable facts, there is no basis for certiorari jurisdiction in this Court.

## REASONS FOR DENYING THE WRIT

The decision of the United States Bankruptcy Court for the Middle District of Florida as affirmed by the

United States District Court for the Middle District of Florida and by the Eleventh Circuit, is consistent with the letter and the spirit of the controlling decisions of this Court and those of other circuit courts of appeals. The lower courts' construction of 11 U.S.C. § 502(h) is consistent with the plain meaning of the statute and with its application by other courts. There is no novel issue of law inherent in this case. Rather, the petition here before the Court represents what is hopefully the last in a series of attempts to avoid the effect of *Gurley I*.

## A. PETITIONER'S CLAIM IS BARRED BY THE DOCTRINE OF RES JUDICATA.

Petitioner asserts that certiorari should lie because the decisions of the lower courts are inconsistent with this Court's rulings in *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462, 155 L. Ed. 2d 454 (2003); *Federated Department Stores v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); and *Brown v. Felsen*, 442 U.S. 127, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979). Petitioner is wrong. The lower courts' decisions are entirely consistent with the cited cases and with all other controlling authority on the doctrine of res judicata.

*Archer v. Warner* addresses facts that are not analytically analogous to the convoluted litigation in *Gurley I*, *Gurley II* and *Gurley III*. In *Archer*, the issue before the court was whether a settlement agreement created a novation of the original dispute, and, if so, whether the novation was insulated from the alleged fraud. Substantially the same issue had been presented in the *Brown* case; there, the settlement had resulted in a consent judgment rather than a settlement agreement. In both

cases, the Court ruled that the settlement (whether memorialized by contract or by stipulated judgment) did not prevent the bankruptcy court from considering the allegations of underlying fraud to determine whether the obligation created by the settlement was dischargeable.

That issue is not present in this case. In both *Archer* and *Brown*, trial of the issue of fraud had been forestalled by the settlement. The issue had not been litigated or resolved by the court; fraud was not established. Here, the issue of the value of Mr. Gurley's interest in the assets has been litigated explicitly in *Gurley II* and implicitly in *Gurley I*. Mrs. Gurley's interest – the assets remaining in her bankruptcy estate – has also been fully litigated.

Petitioner's reliance on *Archer* and *Brown* appears to argue that Mrs. Gurley's payment of the value of Mr. Gurley's interest in the assets of Mrs. Gurley's estate was a "settlement" analogous to those which did not constitute res judicata in the cited cases. This argument misses the critical point of *Gurley II* – the valuation of Mr. Gurley's interest was completely litigated and the subject of express findings of fact entered by the Tennessee Bankruptcy Court. [R. 5; *In re Betty Jean Gurley*, Case No. 97-35255 (Order of August 31, 1998) (Bankr. W.D. Tenn. 1998)] Petitioner asserts here (as she did before the Eleventh Circuit) that the Tennessee Bankruptcy Court ignored her interest by valuing Mr. Gurley's estate's equitable interest at the full value of the disputed assets. That valuation is entirely consistent with the Florida Bankruptcy Court's determination that Mr. Gurley had retained ownership and control over all the assets, and it is not inconsistent with the Tennessee Bankruptcy Court's holding that Mrs. Gurley held, at best, a nominal interest in the assets. If the Tennessee Bankruptcy Court erred

(and it did not), Mrs. Gurley bore the responsibility of addressing that error with the Tennessee Bankruptcy Court or with the appropriate appellate courts. That is, she should have and could have raised the issue of the value of her interest in the assets at the time the Tennessee Bankruptcy Court was considering the value of the Trustee's interest in the assets. *See D-1 Enterprises v. Commercial State Bank*, 864 F.2d 36, 38 (5th Cir. 1989).

Not only did Mrs. Gurley **not** object to or appeal from that valuation, she incorporated that valuation into her confirmed consensual plan. She is bound by the confirmation of the plan, as is the Trustee. 11 U.S.C. § 1141(a); *Matter of Howe*, 913 F.2d 1139, 1143-47 (5th Cir. 1990) (Holding that confirmed consensual plan allowing creditor's claims barred debtor's subsequent action against creditor); *In re Harloff*, 247 B.R. 523, 527 (Bankr. M.D. Fla. 2000).

The Eleventh Circuit's ruling on this point is correct and does not contradict or vary this Court's decisions in *Archer* or *Brown*:

> Allowing Followell to dispute the nature of ownership and value of the property at issue would relitigate issues already finally determined by both [the Florida and the Tennessee] bankruptcy courts. Followell cannot now assert that Mrs. Gurley paid consideration or value for transferred property because those issues were previously litigated. Now, dissatisfied with the Tennessee Bankruptcy Court's valuation, and failing either to persuade the Tennessee court or pursue an appeal through the Sixth Circuit Court of Appeals, Followell returns to the Eleventh Circuit to collaterally attach the Tennessee Court's valuation. The doctrines of res judicata

> and collateral estoppel bar relitigation of these issues.

App. 3a. In *Archer* and *Brown*, the issue of fraud had never been litigated. Here, the issue of valuation has been fully litigated. There is no conflict between the decision of the Eleventh Circuit in this case and the decisions of this Court; the issue presented is not novel nor of importance beyond the scope of this litigation. There is no reason for this Court to grant certiorari on this issue.

## B. THE FLORIDA BANKRUPTCY COURT, THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA AND THE ELEVENTH CIRCUIT CORRECTLY APPLIED 11 U.S.C. § 502(h).

Petitioner asks the Court to grant certiorari to review the lower courts' interpretation of 11 U.S.C. § 502(h). Again, the interpretation of that statute is consistent with the plain language of the statute and its application by other courts. Petitioner's basis for asserting a claim under section 502(h) is not consistent with the meaning or purpose of the statute.

Petitioner's argument on this issue arises from a misapprehension of the effect of the Tennessee Bankruptcy Court's valuation of Mr. Gurley's interest in the assets in Mrs. Gurley's estate. This misunderstanding is manifest in footnote 10 of the Petition for Writ of Certiorari. Petitioner characterizes the relief sought thus: "What Mrs. Gurley seeks is merely an evidentiary hearing to determine the extent of her interest in the total bundle of assets which were returned to her husband's estate." Petition at 11 n.10. In fact, no bundle of assets **was** returned to Mr.

Gurley's estate. Mrs. Gurley compensated Mr. Gurley's estate for the value of his interest in the assets **she retained** as determined by the Tennessee Bankruptcy Court. *See* 222 B.R. at 146-47.

Section 502(h) of Title 11 of the United States Code provides:

> A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

Section 502(h) claims generally arise when the claimant was required to surrender a payment the debtor made to satisfy a **valid** obligation. If the payment was made during the preference period, the claimant is required to disgorge the payment, but the underlying valid obligation is reawakened and may be asserted as a claim against the bankruptcy estate. The logic behind the statute is clear: The creditor who received and returned a preferential payment is left no worse off than he would have been had the preferential payment never been made.

This settled rule of law simply has no application to the facts underlying Appellant's claim. In the Trustee's adversary action against Mrs. Gurley in *Gurley I*, Mrs. Gurley had the obligation (and every reason and opportunity) to assert her pre-transfer interest in the purportedly transferred assets and any consideration she had given for those assets. She did not meet her burden of proof. The Florida Bankruptcy Court's ruling conclusively establishes that Mrs. Gurley had no interest in and gave no consideration

for the assets she held as Mr. Gurley's nominee, which, contrary to Petitioner's statement to this Court, were by no means **all** of Mrs. Gurley's assets. The Florida Bankruptcy Court and the Eleventh Circuit both recognized that Mrs. Gurley never had any true ownership interest in those assets at all – they were never really hers.

The Tennessee Bankruptcy Court, however, recognized and enforced Mrs. Gurley's legal title to the assets. It valued Mr. Gurley's equitable interests in those specific assets named in the Florida Bankruptcy Court's Amended Final Judgment. Thus, when Mrs. Gurley agreed in her plan of reorganization to pay the value of Mr. Gurley's interest in assets Mrs. Gurley's estate retained, she was not giving up anything of value to which she had a legal right. Rather, she purchased her husband's equitable interest in assets to which she held only naked legal title.

Petitioner asserts conflict with the decision of the First District Court of Appeals in *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248 (1st Cir. 1991).[4] In that case, a creditor/investor had engaged in fraudulent transfers to surreptitiously obtain payment on the loans it had made to the debtor. The subterfuge was discovered by the bankruptcy court, and the investor/creditor was required to divest itself of the fraudulently transferred payments. Nonetheless, the underlying loan to the debtor had preexisted the filing of the bankruptcy. Thus, when the fraudulent and improper payments

[4] Significantly, Petitioner did not cite *Max Sugarman* as persuasive authority in its briefs to the Eleventh Circuit. Mrs. Gurley did cite the case in briefing to the United States District Court for the Middle District of Florida.

were turned over to the bankruptcy estate, the pre-existing and valid loans were resurrected as a valid claim in the bankruptcy estate.

It is the pre-existing, valid obligation of the debtor to the creditor that distinguishes *Max Sugarman* from Mrs. Gurley's denied claim. Mrs. Gurley's estate retained her entire interest in the assets. She did not **return** assets to Mr. Gurley's estate. Rather, her estate paid his estate the value of **his** interest in certain property of her estate. The Tennessee Bankruptcy Court determined both the validity and the value of Mr. Gurley's claim. Petitioner may not use 11 U.S.C. § 502(h) to recapture payments she voluntarily made to satisfy an interest in property of her estate.

In disallowing Mrs. Gurley's claim, the Florida Bankruptcy Court did not create a novel interpretation of section 502(h). Rather, citing to *Southmark Corp. v. Schulte, Roth & Zable, L.L.P.*, 242 B.R. 330 (N.D. Tex. 1999), *aff'd in part, rev'd in part*, 239 F.3d 365 (5th Cir. 2000); *Official Committee of Unsecured Creditors v. Liberty Savings Bank, FSB (In re Toy King Distributors, Inc.)*, 256 B.R. 1, 204 (Bankr. M.D. Fla. 2000); *County of Sacramento v. Hackney (In re Hackney)*, 93 B.R. 214 (Bankr. N.D. Cal. 1998), and *Nakagawa v. Sergio, Inc. (In re Sergio, Inc.)*, 16 B.R. 898 (Bankr. D. Haw. 1981), the Florida Bankruptcy Court followed the teachings of prior case law. It adopted the analysis of those cases that holds that "§502(h) addresses the problem of creditors who need to reassert their satisfied pre-petition claims, rather than providing or a new claim created by the mere avoidance of a pre-petition transfer." App. 44a. The rulings of the Florida Bankruptcy Court in *Gurley I* and of the Tennessee Bankruptcy Court in *Gurley II* establish with complete finality that Mrs. Gurley "did not have a claim against the Debtor before the

Petition Date." *Id.* Because Mrs. Gurley lacked a valid pre-petition claim which had been satisfied by Mr. Gurley's fraudulent and avoided transfers, Mrs. Gurley did not have a meritorious claim pursuant to section 502(h).

The decision of the Eleventh Circuit on this issue is not novel; it is not in conflict with the decisions of other circuit courts of appeal; it is not contrary to the plain meaning of the statute or to the policy underlying the statute. There is no reason for the Court to grant certiorari review of this issue.

## CONCLUSION

For the foregoing reasons, Respondent George E. Mills, Jr., Chapter 7 Trustee, asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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